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Potter Stewart

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IN the spring of 1958, Justice Harold Burton informed President Eisenhower of his decision to retire at the end of the Term, but, at the President's request, withheld public announcement until the latter was ready to name a successor. In September, Eisenhower appointed Potter Stewart, who became, at age forty-three, the second youngest person to serve on the Supreme Court since the Civil War.

Despite Stewart's youth, his appointment was not a surprise to the handful of law clerks who knew of Justice Burton's impending retirement. We had concluded that Stewart was the likely choice almost as soon as we had learned of Justice Burton's decision. I should like to claim that our prediction demonstrated astuteness, but the truth is otherwise. Although he had been serving on the Court of Appeals for the Sixth Circuit for only four years, Stewart had already established a reputation as one of the country's ablest judges. Our expectation that he would be named reflected our hopes far more than the shrewdness of our political judgments.

Justice Stewart joined the Court at a particularly difficult time in its history. The bitter attack upon the Court that had been sparked by *Brown v. Board of Education*[1] had not yet subsided; indeed, it had been fueled by a number of decisions that curbed some of the excesses of the anticommunist hysteria from which the country was emerging.[2] The intensity of the attack may be gauged by two events. In August 1958, the Conference of State Chief Judges adopted a resolution calling upon the Court to recognize and give effect "to the difference between that which, on the one hand, the Constitution may prescribe or permit and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable."[3] More significantly, in May, the Senate Judiciary Committee had reported out a bill that would have stripped the Court of jurisdiction in state bar

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[1] 347 U.S. 483 (1954).

[2] *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[3] *See Resolution on Federal-State Relationships As Affected by Judicial Decisions*, 32 ST. GOV'T 74 (1959).

admission cases and reversed four of the Court's recent decisions, three of which had important constitutional overtones.[4] The bill failed by only eight votes.[5]

There were also internal problems. On a surprising range of issues, the eight Justices whom Justice Stewart joined on the Court displayed a tendency to vote in blocs. Chief Justice Warren and Justices Black, Douglas, and Brennan were arrayed on one side and Justices Frankfurter, Clark, Harlan, and Whittaker on the other side of a line that was popularly regarded as dividing "liberals" and "conservatives." The division was the source of some tension within the Court, but the particulars are not mine to reveal.

Justice Stewart's relative youth and the fact that he held only a recess appointment until nearly the end of the Term must have added to the burden that the external pressures and the internal division would have imposed upon any new appointee. But if any of these circumstances weighed upon him, he gave no indication of that fact to his law clerks. Rather, we learned from his example the strengths to be found in adherence to a professional tradition.

The relationships between the members of the Court and their clerks are various, depending largely upon the personalities of the Justices. Our relationship with Justice Stewart was informal and open.[6] He regularly reported the decisions taken at the Friday conferences and responded fully to our inquiries about positions that had been taken during the Court's deliberations. He tried out his ideas on us[7] and permitted us to watch him struggle with the decisions he found difficult. Yet I cannot recall a single instance — I am confident there was none — in which Justice Stewart spoke disparagingly of another member of the Court. He freely discussed his disagreements with other Justices, but he never attempted to buttress his position by demeaning those with whom he disagreed. From other chambers we learned of blunders by a Justice at the conference, or heard of uncomplimentary statements by one Justice about another, but never from Justice Stewart. Although deprived of the titilation that comes with being privy

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[4] S. REP. No. 1586, 85th Cong., 2d Sess. (1958); S. 2624, 85th Cong., 1st Sess. (1957). *See generally* W. MURPHY, CONGRESS AND THE COURT 154–71, 208 (1962).

[5] 104 CONG. REC. 18,687 (1958).

[6] John L. Evans, Jr., who now practices law in Cincinnati, also served as a law clerk to Justice Stewart during the Justice's first Term.

[7] In an informal talk to alumni of the Yale Law School, Justice Stewart once likened his law clerks to a backboard, against which he could bounce ideas. It is characteristic of the man that immediately afterwards he sought us out to make certain that our feelings had not been hurt by his description of the role.

to the secrets of those in high places, we gained a lesson in the meaning and importance of civility more valuable than the gossip we were denied.

Justice Stewart's refusal to traffic in gossip or personalities was an attribute of the whole man, but it was rooted more particularly in his commitment to a professional code that also signficantly influenced his intellectual stance toward the work of the Court. Shortly after his appointment, responding to a newsman's request that he characterize himself as a judicial liberal or conservative, Justice Stewart said, "I like to be thought of as a lawyer."[8] Inability to predict the course of a Justice's career on the Court has become a part of our folklore, but Justice Stewart's characteristically unpretentious statement presaged his performance during the nearly twenty-three years that he served on the Court. I do not mean, of course, that one might have foretold many, or even any, of the thousands of votes he cast in that period. After all, many of the issues, great and small, that were to come before the Court during his tenure could not have been anticipated at the time he was appointed. Nevertheless, Justice Stewart's belief that the judicial role is grounded in the lawyer's craft served as the foundation for a stable and consistent approach to the work of the Court during a period in which it decided more novel and important issues than in any other in its history.

Yet one may say of Justice Stewart, as he once wrote of Justice Jackson, that throughout this period:

> [He] remained the despair of those Court observers — and they are many — who fatuously insist on pinning a "conservative" or "liberal" label on every Justice. To the result-oriented critics of the Court — and they are far too many — he remained something of a puzzle to the end. I think he would have regarded their puzzlement with detachment, if not with scorn.[9]

Justice Stewart never confused cases with causes or ideology. The responsibility of the judge, in his view, is to decide the former, not to promote the latter.

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[8] Israel, *Potter Stewart*, in 4 THE JUSTICES OF THE SUPREME COURT, 1789–1969, at 2921, 2921 (L. Friedman & J. Israel eds. 1969); *see also* Powell, *Justice Stewart*, 95 HARV. L. REV. 1, 1 (1981).

[9] Stewart, *Robert H. Jackson's Influence on Federal State Relationships*, 23 REC. A.B. CITY N.Y. 7, 26–27 (1968) (footnote omitted). I doubt, however, that the last sentence accurately describes Justice Stewart's attitude. He too, I suspect, "regards the puzzlement of the result-oriented critics with detachment," but with amusement and wonder rather than scorn.

Cases arise in specific factual settings. The issues they present, as my colleague Jerold Israel — also a Stewart clerk — observed in describing the Justice's conception of the judicial role:

> are far too complex to be resolved by the simple application of one or two absolute values. The judge views an issue in the context of a specific factual situation, and his resolution of the issue must take into account a multitude of considerations presented by that context — considerations too diverse and complicated to be categorized or analyzed readily in terms of any set of doctrinaire labels. His decisions cannot be based upon abstract generalities, but must be the product of a careful evaluation of all relevant factors that will produce an answer that is pragmatically and theoretically sound.[10]

Justice Stewart's attentiveness to the uniqueness of cases and sensitivity to the competition among values are largely responsible for his reputation as a "swing vote" within the Court. The reputation is deserved if what is meant is that he did not predictably side with one or another of the voting blocs into which the Court tended to divide on the dominant issues of the past quarter century. But insofar as it rests upon the notion that he lacked guiding principles, it reflects a failure of understanding.[11] Shades of gray may not be perceptible to everyone, but they exist nonetheless. Justice Stewart inhabits a world in which moral and political choices, and therefore legal decisions, are made in gray areas. Both emotionally and intellectually, he appreciates that cases that reach the Supreme Court rarely present simple contests between the forces of light and the forces of darkness. Each of the litigants, as well as the larger interests that each represents, seeks recognition of claims that might reasonably be embraced within the concept of the public interest.

Justice Stewart's opinions and voting record reveal a deep commitment to the central tenets of the American liberal tradition — fair process, representative government, freedom from arbitrary or oppressive governmental action, individual autonomy and the value of privacy in fostering it, and the free expression of ideas. No one who knows him will doubt that these ideals are part of the fabric of the man. He did not, however, regard them as a program that his office entitled him to advance. One reason, no doubt, was his continual aware-

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[10] Israel, *supra* note 8, at 2921.

[11] Professor Israel's perceptive essay, written near the end of Justice Stewart's first decade on the Court, is required reading for anyone who seeks an understanding of those principles. *See id.*

ness that the ideals often collided with one another and with others that are recognized by our legal tradition. Another, I suspect, was the belief that the Court could not govern the country, certainly not well and perhaps not at all.

To be sure, the Court's place in our constitutional system requires that it check governmental action inconsistent with our evolving ideals, and Justice Stewart did not shrink from that responsibility. But like Justice Jackson and Justice Harlan, the two members of the post-World War II Court with whom he has the greatest affinity, he resisted broad limitations on governmental power that would have disabled government from dealing with societal conflict. Justice Stewart was, I believe, reflecting his own views as much as he was describing Justice Jackson's when, in one of his few extramural statements, he quoted the latter's comment that "[t]he vice of judicial supremacy, as it existed for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."[12]

The years during which Justice Stewart served on the Court were as emotionally charged as any in its history. They were years in which the ideal of judicial detachment was sorely tested and in which some even questioned its worth. Justice Stewart remained faithful to the ideal. Whatever his personal sympathies, he did not as a judge enlist in any causes nor ally himself with any faction. He also met what may have been a more difficult challenge: to avoid becoming the captive of those with whom he disagreed. The independence of spirit and mind that he displayed during these troubled years could not have been achieved without great personal and intellectual strength. Those who worked for him and those for whom he worked — the people of the United States — are deeply in his debt for the skill and effectiveness with which he maintained the ideal.

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[12] R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 321 (1941), *quoted in* Stewart, *supra* note 9, at 14.